

2019

School Finance Litigation and the Separation of Powers

Larry J. Obhof

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>



Part of the [Constitutional Law Commons](#), [Education Law Commons](#), [Jurisdiction Commons](#), [Juvenile Law Commons](#), [Legal Remedies Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Obhof, Larry J. (2019) "School Finance Litigation and the Separation of Powers," *Mitchell Hamline Law Review*. Vol. 45 : Iss. 2 , Article 6.

Available at: <https://open.mitchellhamline.edu/mhlr/vol45/iss2/6>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.
© Mitchell Hamline School of Law

SCHOOL FINANCE LITIGATION AND THE SEPARATION OF POWERS

Larry J. Obhof[†]

I.	INTRODUCTION.....	536
II.	THE HISTORY OF SCHOOL FINANCE LITIGATION.....	540
	<i>A. The First and Second Waves and the Search for Equity</i>	<i>543</i>
	<i>B. The Challenges of the Equity Approach</i>	<i>545</i>
	<i>C. The Third Wave and the Search for an Adequate</i> <i>Education</i>	<i>547</i>
	<i>D. Recent Trends in Education Litigation.....</i>	<i>550</i>
III.	HOW HAVE COURTS BALANCED THE SEPARATION OF POWERS IN SCHOOL FINANCE LITIGATION?.....	553
	<i>A. Does Constitutional Language Determine Litigation</i> <i>Outcomes?.....</i>	<i>557</i>
	<i>B. What About the Separation of Powers?.....</i>	<i>560</i>
IV.	WHERE SHOULD COURTS DRAW THE LINE?.....	563
	<i>A. Do Courts Need to Prescribe a Remedy in Order to Effect</i> <i>Change?.....</i>	<i>565</i>
	<i>B. Ohio's Experience and the Middle Ground.....</i>	<i>567</i>
	<i>C. What Does the "Middle Ground" Mean for Emerging</i> <i>Education Litigation?.....</i>	<i>571</i>
V.	CONCLUSION	572

I. INTRODUCTION

Providing and maintaining an education system is one of the most important functions of state and local governments.¹ Few would dispute

[†] President of the Ohio Senate; Of Counsel, Squire Patton Boggs (US) LLP; J.D., Yale Law School; B.A., The Ohio State University. The views expressed in this article are solely those of the author.

1. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”); see also *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (“Providing public schools ranks at the very apex of the function of a State.”); Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 136, 136 (Helen F. Ladd et al. eds., 1999) (“Education is one of the most

that fact. Educational attainment is linked to students' long-term economic success and to the social mobility that has marked economic progress in the United States and around the globe. Parents know this instinctively. We want our children to do well in school, to learn as much as possible, and to have the best possible opportunities as they grow older.

In my experience as a state legislator, I have found that policymakers largely want the same things for the people they represent. One of my colleagues in the state senate is fond of saying that "children are thirty percent of our population, but they are one hundred percent of our future."² His point is well-taken. It is important not only that *your own* children receive a quality education and have better economic opportunities, but that *all* children do. Your children (and mine) will live in the world populated by their peers. Presumably, most of us want our own children to live in a society where others also are living up to their fullest potential: where people are well-educated or well-trained for economic opportunities,³ where citizens are able to choose (and serve as) responsible public officials,⁴ and where upward mobility helps overcome barriers such as race and class.⁵

Thus, I start with two propositions. First, that most people view education as both a private and a public good. Second, that most policymakers share the broad-based goal of providing a quality education. Things break down from there.

Policymaking is not as simple as asking, "Do you think children should have quality educational opportunities?" It involves a host of other questions and competing interests. What constitutes a quality education? How does one provide it? How much do specific inputs, like money,

important investments that a state can make in the future of its individual citizens and of the society as a whole.").

2. This is an often-used quote from the Minority Leader of the Ohio Senate, State Senator Kenny Yuko. Although I have not independently verified his math, the rhetorical force of his point appears to resonate with our constituents.

3. See Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 570 (2004) [hereinafter *Rethinking*] ("The economic benefits that a society gains from having well-trained and educated workers are well known."); Elizabeth Reilly, *Education and the Constitution: Shaping Each Other and the Next Century*, 34 AKRON L. REV. 1, 2 (2000) ("Our economic system [] proclaims its reliance upon well-trained and educated workers.").

4. See *Brown*, 347 U.S. at 493 ("[Education] is required in the performance of our most basic public responsibilities It is the very foundation of good citizenship.").

5. See Reilly, *supra* note 3, at 2-3 ("And our social system rests on two largely accepted goals that each require access to education—the 'melting pot' which requires the successful absorption of diverse immigrant populations into a pluralistic social and cultural structure, and 'upward mobility' which requires the permeability of class barriers.").

make a difference in achieving this goal? What other public policy concerns are weighed against education in the competition for limited resources? These and many other questions combine into the overall discussion that policymakers must undertake.

Who are the proper persons to answer these questions? Or perhaps more pointedly, which is the proper branch of government to make these determinations? Many would say these policymaking functions belong to the legislative or executive branches—the branches charged by state constitutions with policymaking authority. Importantly though, most state constitutions contain a requirement to provide for some “common” or “thorough” or “efficient” system of schools, or some other language making government responsible for providing education.⁶ It is a court’s responsibility, when presented with a proper case or controversy, to determine whether a constitutional requirement like this has been violated.⁷

Thus, for decades we have seen lawsuits across the country, filed by plaintiffs seeking to invalidate their states’ school funding schemes or increase funding for primary and secondary education.⁸ Many of these cases have succeeded; some rightly so. But rightly or wrongly, when a court strikes down a school funding formula or seeks to impose a remedy of its own, it intrudes upon the functions of the other branches of government. Which begs another question: when confronted with a

6. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 111-12 (1973) (Marshall, J., dissenting) (“[I]n 48 of our 50 States the provision of public education is mandated by the state constitution.”); Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1107 (2000) (“Forty-eight state constitutions include some provision regarding the state’s duty to educate”); Matt Brooker, Comment, *Riding the Third Wave of School Finance Litigation: Navigating Troubled Waters*, 75 UMKC L. REV. 183, 189 (2006) (“Nearly all states . . . impose some duty on the state legislature to maintain or provide for public education.”); Madeline Davis, Comment, *Off the Constitutional Map: Breaking the Endless Cycle of School Finance Litigation*, 16 BYU EDUC. & L.J. 117, 122-23 (2016) (“All states have imposed upon themselves positive constitutional duties to maintain education.”).

7. Notwithstanding my own concerns about judicial encroachment on legislative authority, I have previously argued that some level of judicial review is appropriate when plaintiffs challenge the constitutionality of a school funding scheme. See *Rethinking*, *supra* note 3, at 575 (“[I]t is the responsibility of courts to interpret their state’s constitution and determine whether or not the finance schemes at issue meet the constitutional requirements.”).

8. For some general background on the history of school finance litigation, see William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1901-07 (2017); Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 500-03 (2014); Brooker, *supra* note 6, at 184-88.

constitutional challenge to a school funding system, what should a court do? Even if we agree that courts *can* invalidate a funding scheme under the right circumstances, there remains the separate question of what those circumstances are.

When I looked at these issues roughly fifteen years ago, I reviewed a range of state supreme court cases and compared the outcomes in those cases to the education clauses they were interpreting. I found at the time that “the constitutional language itself is sometimes less important than a court’s will to reach a specific outcome.”⁹ Some courts addressed challenges brought under fairly strong constitutional language, yet they found the issues non-justiciable or otherwise ruled against the plaintiffs.¹⁰ Other courts relied on comparatively weak constitutional provisions to order broad public policy changes.¹¹ Still others engaged in substantive policymaking that appears to fall outside of the funding questions actually presented by the litigation.¹² I found this pattern troubling then, and I still do today.

This article addresses the significant separation of powers issues raised by school finance litigation. It provides an overview of such litigation over the past several decades, including developing trends away from

9. *Rethinking*, *supra* note 3, at 572. In the time since then, others have found no correlation between state courts’ decisions in school finance litigation and those states’ constitutional provisions regarding the separation of powers. *See, e.g.*, Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers*, 61 ALA. L. REV. 701, 701 (2010) (finding “no evidence of any association” between “the explicitness of a state’s constitutional text relating to separation of powers and the decision of the state’s courts whether to engage in merits adjudication of educational adequacy claims”).

10. *See, e.g.*, *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1193 (Ill. 1996) (interpreting a strong education clause but holding that the question of whether the state’s schools were “high quality” was “outside the sphere of the judicial function”); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 57 (R.I. 1995) (stating that the legislature has “virtually unreviewable discretion” in the area of school finance); *see generally* William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 542 (1998) (arguing that “courts in Georgia and Illinois . . . refused to enforce the clear commands of the state constitution”).

11. *See, e.g.*, *Brigham v. State*, 692 A.2d 384 (Vt. 1997) (relying on a weak constitutional provision to hold the state’s school funding system unconstitutional). *See generally* Thro, *supra* note 10, at 540–41 (“On the activist side, the courts in Alabama, Arizona, Connecticut, Massachusetts, Nebraska, New York, North Carolina, Tennessee, and Vermont found a quality standard or a fundamental right even though the relevant constitutional text simply establishes a system of education.”).

12. *See* *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989) (setting out substantive policy goals that schools must achieve, including seven “capabilities” that students must obtain).

funding and into other areas beyond school finance.¹³ It looks at the varying approaches taken by courts deciding such cases and examines the relationship (or lack thereof) between the courts' decisions and the actual constitutional language that they are interpreting.¹⁴ This article advocates for a better balancing of judicial review against the legislature's role as the primary policymaker in school finance legislation and budgeting.¹⁵

While I have written about this subject before, much has happened in the subsequent years.¹⁶ Litigants are moving beyond school finance and focusing instead on more discrete issues like teacher tenure.¹⁷ I now also have the added perspective of leading a state senate and engaging in the natural tug-of-war with the other branches of state government over the proper scope of each branch's authority. I believe that this article therefore offers a unique view of the issues, as my longstanding academic interest in school funding combines with my experiences as a legislative leader.

II. THE HISTORY OF SCHOOL FINANCE LITIGATION

There has been some form of school finance litigation in more than forty states.¹⁸ My home state of Ohio is no stranger to this conflict. Most recently, Ohio courts dealt with litigation from 1991 to 2003, with the Ohio Supreme Court issuing several decisions holding the state's school funding scheme unconstitutional.¹⁹

13. See *infra* Part II.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See *Rethinking*, *supra* note 3, at 569.

17. See, e.g., *Vergara v. State*, 209 Cal. Rptr. 3d 532, 538 (Cal. Ct. App. 2016) (rejecting a claim that California's tenure rules result in ineffective teachers being assigned to economically disadvantaged students and therefore deny those students equal protection). See generally Michele Aronson, Note, *The Deceptive Promise of Vergara: Why Teacher Tenure Lawsuits Will Not Improve Student Achievement*, 37 CARDOZO L. REV. 393 (2015) (discussing lawsuits related to teacher tenure).

18. See Joy Chia & Sarah A. Seo, *Battle of the Branches: The Separation of Powers Doctrine in State Education Funding Suits*, 41 COLUM. J.L. & SOC. PROBS. 125, 125-26 (2007) (indicating that plaintiffs "have initiated lawsuits in forty-five states to challenge methods for allocating funds for public schools and to demand reforms such as remedial legislation . . . and increased appropriations"); Davis, *supra* note 6, at 125-26 (noting that "court decisions on school finance matters have been issued in forty-four of the fifty states").

19. For a case study of Ohio's school finance litigation, and the state legislature's contemporaneous responses to it, see Larry J. Obhof, *DeRolph v. State and Ohio's Long Road to an Adequate Education*, 2005 BYU EDUC. & L.J. 83 (2005) [hereinafter *Adequate Education*].

The prevalence of impact litigation related to school funding is unsurprising. Nearly every state imposes some duty on its legislature to maintain or provide for public education.²⁰ These requirements vary widely in strength.²¹ Some state constitutions simply direct the legislature to provide for some system of public education.²² Others require the state to provide a system that is “thorough and efficient.”²³ Still others declare education to be a “paramount duty”²⁴ or a “fundamental goal”²⁵ or mandate that the state provide for a “high quality” education system.²⁶

These constitutional provisions provide the basis for litigation. The imposition of a duty on the state government implies a corresponding right by citizens to the fulfillment of that duty.²⁷ Consistent with this view, most

20. See Lundberg, *supra* note 6, at 1107; Brooker, *supra* note 6, at 189; Davis, *supra* note 6, at 122–23.

21. Some observers have attempted to categorize the various states’ education clauses by the relative strength and specificity of their text. These are typically broken down into either three or four categories. For example, William Thro has divided state education clauses into several categories: (1) “establishment provisions” which simply require the establishment of a public school system; (2) “quality provisions” which mandate an education system of a specific quality; and (3) “high duty provisions” that place education above other governmental functions. See Thro, *supra* note 10, at 539–40; see also Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814–16 (1985); Brooker, *supra* note 6, at 189–200.

22. See, e.g., CONN. CONST. art. VIII, § 1 (“There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.”); N.Y. CONST. art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”).

23. See, e.g., MD. CONST. art. VIII, § 1 (“The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.”); PA. CONST. art. III, § 14 (“The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education . . .”).

24. See WASH. CONST. art. IX, § 1 (“It is the paramount duty of the state to make ample provision for the education of all children residing within its borders . . .”).

25. ILL. CONST. art. X, § 1 (“A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services.”).

26. See FLA. CONST. art. IX, § 1(a) (“The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education . . .”).

27. See Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021, 1066–67 (2006) (“[D]uties and rights are opposing sides of a single, legal relationship; i.e., the recognition of

courts have interpreted their states' education clauses "as creating judicially enforceable constitutional rights."²⁸ Plaintiffs—often including students, their parents, or the school districts themselves—therefore view the courts as a potential vehicle for increases in school funding.

Commentators have generally divided school finance litigation into three "waves."²⁹ The first two waves focused on achieving greater educational "equity."³⁰ This often meant an attempt to equalize funding for school districts within a given state. Third wave litigation has focused less on funding disparities and more on the sufficiency of school funding overall. These cases generally ask whether a state's funding system meets a minimally-acceptable standard for all districts.³¹

The strategy of pursuing litigation has been met with mixed results but has spurred substantial new investments in education in many states. Through the first three waves of such litigation, around two-dozen courts of last resort upheld their states' school funding systems. In nearly twenty cases, however, courts relied on their states' education clauses or equal protection clauses to hold a school finance system unconstitutional.³² These include several states, such as Ohio, in which courts had previously rejected challenges to their states' school finance systems.³³

a legal duty in A implies a corresponding right in B, and vice versa."); *see also* Brooker, *supra* note 6, at 189 ("Educational clauses provide a positive right that requires the government to affirmatively provide something to its citizens.").

28. Levy, *supra* note 27, at 1066.

29. *See* Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281 (1998); William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 598 n.4 (1994); Weishart, *supra* note 8, at 500-03; Gail F. Levine, Note, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 507-08 (1991) (describing the "three waves" of school finance litigation); *see also* Koski, *supra* note 8, at 1901-02 (calling the wave metaphor "ill-fitting at best" but nonetheless "stick[ing] with that convention").

30. *See* Weishart, *supra* note 8, at 500-01 (noting that during both the first and second waves, the focus was "formal equality of educational opportunity").

31. *See* Koski, *supra* note 8, at 1905 ("[A]dequacy is a measure that does not compare the educational resources or outcomes of students with each other; rather, it looks only to some minimally required level of resources for all students.").

32. *See* Lundberg, *supra* note 6, at 1101; Karen Swenson, *School Finance Reform Litigation: Why are Some Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1149 (2000).

33. *See Rethinking*, *supra* note 3, at 575; *see also* Lundberg, *supra* note 6, at 1103-04 ("Supreme courts in two states, Arizona and Ohio, originally declined to overturn their school funding systems, but later overruled these decisions and found their systems unconstitutional."); Swenson, *supra* note 32, at 1149 n.12 ("The Arizona, Ohio, and

More recently, litigants are shifting their focus away from inputs (like money) to identifiable outcomes and the specific policies that affect those outcomes.³⁴ These include factors such as teacher tenure laws “that make it difficult to discipline and remove underperforming teachers.”³⁵ Some plaintiffs have made demands for equal access to advanced placement courses.³⁶ Some have targeted the denial of specific factors, including students’ instructional minutes, which directly affect children’s learning opportunities.³⁷ While these actions may lack the cohesiveness necessary to dub them a “fourth wave,” there is a trend away from challenges based simply on funding.

A. *The First and Second Waves and the Search for Equity*

The first wave of school finance litigation involved challenges to school funding schemes based on the federal Equal Protection Clause.³⁸ These challenges were short-lived, beginning in 1971 and ending only two years later.

In *Serrano v. Priest*, the California Supreme Court held that education is a fundamental right.³⁹ The court then held that the state’s property-tax-based funding system violated that right by creating significant spending disparities between school districts.⁴⁰ The U.S. Supreme Court quickly rejected this approach. In *San Antonio Independent School District v. Rodriguez*,⁴¹ the Court held that education is not a fundamental federal right, and that the states are free to balance the values of local

Washington high courts have also previously upheld their respective state’s financing schemes . . .”).

34. Koski, *supra* note 8, at 1915 (“[T]here appears to be an emerging educational rights litigation movement that strategically departs from the [] focus on educational funding and educational finance systems.”).

35. *Id.* at 1916.

36. *Id.* at 1917.

37. *Id.* at 1916 n.84.

38. See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 266 (1999).

39. *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971) [hereinafter *Serrano I*] (“[T]he right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth . . .”).

40. See *id.* at 1264–66 (holding California’s property tax-based funding scheme unconstitutional on state and federal equal protection grounds); see also *Van Duzart v. Hatfield*, 334 F. Supp. 870, 877 (D. Minn. 1971) (holding that Minnesota’s school finance system violated the equal protection clause of the 14th Amendment because “spending per pupil [was] a function of the school district’s wealth”); *Milliken v. Green*, 203 N.W.2d 457, 469–72 (Mich. 1972) (treating wealth as suspect classification).

41. 411 U.S. 1 (1973).

control and equality of educational resources.⁴² Thus, for forty-five years courts have recognized that education is not a federal fundamental right, that property wealth is therefore not a “suspect classification,” and that inter-district inequalities in school spending do not violate the federal Constitution.⁴³

Following *Rodriguez*, plaintiffs shifted their focus. The “second wave” litigants looked to state constitutional provisions, including both state equal protection clauses and education clauses.⁴⁴ Only one month after *Rodriguez*, the New Jersey Supreme Court held that wide spending disparities among school districts violated that state’s constitutional requirement that the state maintain a “thorough and efficient” system of public schools.⁴⁵ Three years later, the California Supreme Court reaffirmed *Serrano* on the grounds that funding disparities violated the California Constitution’s equal protection clause.⁴⁶ By the late 1970s, more than twenty states faced challenges to their school finance systems, with plaintiffs often seeking equalized per-pupil funding.⁴⁷

The results of the second wave were mixed, but more favorable to state defendants.⁴⁸ Plaintiffs won seven of the twenty cases resolved by state supreme courts.⁴⁹ By 1980, roughly thirty states had been involved in some form of school finance litigation.⁵⁰ More than twenty states modified their education finance systems, whether due to political pressures or as a result

42. See *id.* at 35–37, 111 (holding that education is not a fundamental right and upholding an unequal school funding scheme under a rational basis review); see also Richard Rothstein, *Equalizing Education Resources on Behalf of Disadvantaged Children*, in A NOTION AT RISK: PRESERVING PUBLIC EDUCATION AS AN ENGINE FOR SOCIAL MOBILITY 31, 66–67 (Richard D. Kahlenberg ed., 2000); Weishart, *supra* note 8, at 500–01 (noting that the first wave was “derailed at the federal level when the Supreme Court ruled . . . that education was not a fundamental right under the U.S. Constitution”).

43. See Rothstein *supra* note 42, at 67.

44. See Ryan, *supra* note 38, at 266; see also Weishart, *supra* note 8, at 501 (“Eschewing *Rodriguez*’s interpretations of the U.S. Constitution, plaintiffs resorted to the education clauses and equal protection provisions of their state constitutions.”).

45. See *Robinson v. Cahill*, 303 A.2d 273, 297–98 (N.J. 1973).

46. See *Serrano v. Priest*, 557 P.2d 929, 958 (Cal. 1976) [hereinafter *Serrano II*].

47. *Rethinking*, *supra* note 3, at 577.

48. See Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 34, 41–47 (Helen F. Ladd et al. eds., 1999) (providing a state-by-state listing of school finance litigation cases and their results).

49. See Carr & Fuhrman, *supra* note 1, at 146 (stating that plaintiffs won seven out of sixteen school finance cases decided between 1973 and 1980); Weishart, *supra* note 8, at 501–02 (noting that plaintiffs prevailed in seven of twenty-two second wave decisions).

50. MARK G. YUDOF ET AL., *EDUCATION POLICY AND THE LAW* 592 (4th ed. 1992).

of judicial decisions and orders.⁵¹ Plaintiffs “succeeded in obtaining greater per-pupil spending equity across districts in those states that had their school financing systems overturned,” but in some cases, the greater equity came at the expense of “leveling down of education spending overall.”⁵²

A number of the equity lawsuits brought in the 1970s, however, were rejected. These included, among others, a challenge in my home state of Ohio.⁵³

B. The Challenges of the Equity Approach

Plaintiffs were successful in only one of eight school finance cases decided by state supreme courts between 1981 and 1988.⁵⁴ This was a significant drop-off from the prior eight years, in which plaintiffs succeeded in seven cases.⁵⁵ Whether for legal reasons or due to waning popular support, most cases in the 1980s were characterized by deference to state legislatures.⁵⁶ Courts often dealt with state equal protection challenges by holding that education is not a fundamental right and therefore is not entitled to strict scrutiny under state constitutions.⁵⁷ Unsurprisingly, courts generally found that school finance systems met the more deferential rational basis test.⁵⁸

While many second wave cases focused on equality, some plaintiffs raised claims under education clauses requiring their states to provide and maintain “adequate” or “thorough” systems of public schools.⁵⁹ This trend became increasingly common as plaintiffs recognized both the difficulty of winning equity suits and the serious practical problems of the equity

51. *See id.*

52. Weishart, *supra* note 89, at 502.

53. *See Bd. of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979) (rejecting challenges based on state equal protection clause and education clause).

54. *See Carr & Fuhrman*, *supra* note 1, at 146; *see also* Minorini & Sugarman, *supra* note 48, at 55 (stating that from 1980 to 1988, only two state courts invalidated their states’ school funding schemes, while eight upheld their systems as constitutional); Weishart, *supra* note 8, at 505 (“[S]tate courts in the early and mid-1980s were inclined to uphold school finance schemes and give deference to the legislative process.”).

55. Carr & Fuhrman, *supra* note 1, at 146.

56. Minorini & Sugarman, *supra* note 48, at 55.

57. *Id.* *See generally* Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 510 (1995) (discussing the levels of scrutiny applicable to school finance challenges during the various waves of litigation).

58. Minorini & Sugarman, *supra* note 48, at 55; *see also Rethinking*, *supra* note 4, at 578.

59. *See* Kelly Thompson Cochran, Comment, *Beyond School Financing, Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 411 (2000).

approach. Among the most important of these was the recognition that equalized funding is not a real solution if it is obtained by “leveling down” resources in wealthier districts rather than “leveling up” resources for poorer districts.⁶⁰

This is, in fact, the pattern that began to develop. In states where the equity approach was successful, it led to a more even distribution of funding at the expense of overall per-pupil expenditures.⁶¹ Eleven states enacted significant school funding reforms in the 1970s, but eight of those states saw per-pupil expenditures fall relative to the national average.⁶² High profile missteps, such as the experience in California following *Serrano* and the passage of Proposition 13, served as a warning to other states.⁶³ Many feared that the quest for “equity,” no matter how well-intentioned, could lead to funding decreases for a substantial number of districts.⁶⁴

Over time it became apparent that plaintiffs’ litigation strategy had to reject the idea of leveling down funding from the highest spending districts. “Leveling up,” however, is not as simple as it sounds. In the 1990s, for example, Texas faced litigation in which the plaintiffs sought to fund all districts at the 100th percentile.⁶⁵ Yet such a remedy would have required a school finance budget nearly four times as large as the entire annual state budget—something neither the courts nor the legislature could provide.⁶⁶ In the long run, plaintiffs across the country realized that in order to succeed,

60. See YUDOF ET AL., *supra* note 50, at 811 (stating that “the fiscal neutrality approach offered no solution if all districts were equally inadequately funded”).

61. Carr & Fuhrman, *supra* note 1, at 145-46; Weishart, *supra* note 8, at 502 (“[G]reater equity arguably came at a high cost—the leveling down of education spending overall.”).

62. Carr & Fuhrman, *supra* note 1, at 146 (citing Patricia R. Brown & Richard F. Elmore, *Analyzing the Impact of School Finance Reform*, in THE CHANGING POLITICS OF SCHOOL FINANCE 107, 112 (Nelda H. Cambron-McCabe & Allan Odden eds., 1982)).

63. See *Serrano II*, 557 P.2d 929 (Cal. 1976). Following the California Supreme Court’s decision in *Serrano II*, the state’s voters adopted Proposition 13, a constitutional amendment limiting property tax rates to 1 percent of the cash value of real property subject to taxation. See Minorini & Sugarman, *supra* note 48, at 49. Among other things, Proposition 13 also required a two-thirds vote of the legislature to increase state taxes. *Id.* Over time, California went from being one of the highest spending states per pupil for elementary and secondary education to one of the lowest. *Id.*

64. See *Rethinking*, *supra* note 3, at 579 (“[D]ue to the well-known problems in California . . . many saw the banner of ‘equity’ as ‘equally bad for all.’”).

65. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

66. *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 495-96 (Tex. 1991); J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL’Y REV. 607, 649 (1999).

they had to be realistic about their goals and seek remedies for which state governments could actually follow through.

Policy makers also increasingly distinguished school funding from providing a quality education. School funding is *part* of the overall equation, but it is not a cure-all for every educational deficiency. Governors and state legislators were turning their attention toward improving education in other ways. These included strengthening standards, graduation requirements, and teacher certification requirements and compensation.⁶⁷

The rhetoric of “adequacy” also showed promise for plaintiffs who were unsatisfied with the courtroom results of the equity approach. There was reason for optimism. Although the U.S. Supreme Court’s decision in *Rodriguez* closed the door for equal protection violations under the U.S. Constitution, the Court recognized the difference between an “unequal system” and one that “occasioned an absolute denial of educational opportunities to” some children.⁶⁸ The Court noted that a system that precluded poor children from receiving an education “would present a far more compelling set of circumstances for judicial assistance.”⁶⁹

This change in focus became necessary for plaintiffs. By the 1990s, several courts found that equity plaintiffs had not demonstrated an actual denial of constitutional rights.⁷⁰ Courts were increasingly unlikely to strike down a school finance system based on solely on inter-district disparities.⁷¹ Thus, plaintiffs began to question whether school funding systems were “adequate,” i.e., whether they were meeting some basic standards necessary to provide all districts’ students with a constitutionally-required minimum level of education.⁷² This ushered in the third wave of school finance lawsuits.

C. *The Third Wave and the Search for an Adequate Education*

Commentators generally agree that the third wave began in 1989, with plaintiff victories in Kentucky⁷³ and Montana.⁷⁴ The new adequacy-based

67. Carr & Fuhrman, *supra* note 1, at 147.

68. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

69. *Id.* at 25 n.60.

70. See Hornbeck v. Somerset Cty. Bd. of Educ., 458 A.2d 758 (Md. 1983); Bd. of Educ. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982); Britt v. N.C. State Bd. of Educ., 357 S.E.2d 432 (N.C. Ct. App. 1987); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).

71. Minorini & Sugarman, *supra* note 48, at 55.

72. *Id.* at 55–56 (footnote omitted).

73. Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); see Weishart, *supra* note 8, at 502 (“The third wave of school finance litigation (1989-present) was

litigation focused on the sufficiency of school funding.⁷⁵ In these cases, plaintiffs relied on state education clauses to argue that all children are entitled to some base level of educational quality.⁷⁶ Third wave plaintiffs have typically sought to bring the lowest-funded school districts up to the minimum level mandated by state constitutions.⁷⁷

Plaintiffs' shift in strategy paid off. The third wave plaintiffs have had much better overall success than their predecessors. More than thirty school finance lawsuits have been brought since 1989, with plaintiffs succeeding (at least in part) in more than twenty of those.⁷⁸ So while these results have been mixed, the third wave was much better for plaintiffs, as a number of courts throughout the country were persuaded that their state's poorest school districts failed to meet some minimum standard.⁷⁹ Additionally, courts in a few states that had previously rejected equity challenges to their school finance systems, like my home state of Ohio, found their states' systems unconstitutional under an adequacy-based standard.⁸⁰

Adequacy has been more compelling than equity in the courtroom, leading commentators to describe it—correctly, in my view—as the “dominant legal theory” in school finance litigation.⁸¹ Why is this so? I have argued before that the adequacy approach seeks a goal that is both

triggered by the Supreme Court of Kentucky's decision that the state's ‘*entire system* of common schools [was] unconstitutional.’”) (alteration and emphasis in original) (quoting *Rose*, 790 S.W.2d at 215).

74. *Helena Elementary Sch. Dist. v. State*, 769 P.2d 684 (Mont. 1989).

75. Heise, *supra* note 29, at 1019.

76. As discussed above, nearly every state has some constitutional provision regarding public education. *See supra* note 6 and accompanying text; *see also* Swenson, *supra* note 32, at 1148 n.9 (listing state constitutional provisions); Thro, *supra* note 11, at 538–39 n.33 (same).

77. *See Rethinking*, *supra* note 3, at 582; Ryan, *supra* note 38, at 268; Thro, *supra* note 29, at 603.

78. *See* Davis, *supra* note 6, at 123 (“[T]wenty-two out of thirty-three, or sixty-seven percent, of adequacy cases decided since 1989 have been victories for the plaintiffs.”) (citing Michael A. Rebell, *COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* 15–29 (2009)); Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J.C.R. & C.L. 83, 85 (2010) (noting that between 1989 and 2005, adequacy plaintiffs “won more than seventy-five percent of the cases”) (footnote omitted).

79. Swenson, *supra* note 32.

80. *See* Lundberg, *supra* note 6, at 1103–04 (noting that Ohio and Arizona rejected challenges to their school funding schemes, but later found them unconstitutional under an adequacy standard).

81. Weishart, *supra* note 8, at 482.

more modest and more important than equalized funding.⁸² Adequacy “refers to resources which are sufficient (or adequate) to achieve some educational result,” or some other measurement of educational attainment.⁸³ It is an outcome-oriented strategy focused on the quality of education provided to a state’s students.⁸⁴ The adequacy approach does not quibble over the relative distribution of resources. Rather, it asks what inputs are needed to attain a desired level of achievement and seeks that level of funding.⁸⁵ Although both adequacy and equity lawsuits are about money, the adequacy approach seems more student-centered.

As a personal matter, I believe that the adequacy approach also is more in line with the goals of students’ parents, and with the views of many policymakers. As a parent, I am much more concerned with the absolute quality of education my children receive than I am with whether students at another school received a higher per-pupil funding amount. Adequacy changes the focus from inputs to outputs, is “less complicated,” and is (at least in theory) “less costly” than equalization.⁸⁶

The adequacy standard also is more respectful of the separation of powers. It is the function of courts “to say what the law is.”⁸⁷ This arguably includes determining if a minimum standard is required by the state constitution, finding that a specific set of facts does not meet that standard, and then holding the underlying system unconstitutional. Indeed, the latter is the very essence of judicial review. By contrast, the equity approach practically invites courts to engage in policymaking by ordering funding levels, even though state constitutions leave such functions to the legislature. By doing so, the equity approach runs afoul of our traditional view of the separation of powers. In our system of government, “the power

82. See *Rethinking*, *supra* note 3, at 582.

83. YUDOF ET AL., *supra* note 50, at 773 (citing William Clune, *Accelerated Education as a Remedy for High-Poverty Schools*, 28 U. MICH. L. REV. 655 (1995)).

84. *Rethinking*, *supra* note 3, at 583.

85. See *Introduction*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 1, 1–2 (Helen F. Ladd et al. eds., 1999).

86. Ryan, *supra* note 38, at 270 (arguing that the adequacy approach “is less complicated a notion, more normatively appealing.... [and] is also less costly” than the equity approach).

87. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); *THE FEDERALIST* NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that it is the duty of courts “to declare all acts contrary to the manifest tenor of the Constitution void”); see also *THE FEDERALIST* NO. 80, at 475 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that, in the federal context, courts should give efficacy to constitutional provisions).

of judging” is “separated from the legislative and executive powers.”⁸⁸ It is the fundamental province of the courts to say what the law *is*, but not what it *should be*.⁸⁹

Of course, not all courts deciding “adequacy” cases have confined their decisions to the constitutional questions properly before them. Some courts—including the Kentucky Supreme Court in its decision kicking off the third wave—have taken an activist approach and substituted their will for that of the legislature.⁹⁰

D. Recent Trends in Education Litigation

If the third wave is still going on, it has been slowing down for quite some time. Commentators have noted, “the balance between deference and action by courts in adequacy suits has begun to tip toward deference and away from judicial intervention.”⁹¹ Plaintiffs’ adequacy claims were dismissed prior to trial in nine of nineteen decisions between 2005 and 2008.⁹² This compares to only five such decisions over the preceding sixteen years.⁹³

So why the shift in outcomes? I believe this is due to a host of factors, not the least of which is a feeling that school funding issues have been “dealt with” by prior courts and prior legislatures. Whether accurate or not, this view has some factual support. Adequacy lawsuits generally *did* have a positive effect on school funding, with litigation or legislative education reform leading to significant increases in overall education spending.⁹⁴ In states where litigation was successful, court-mandated

88. THE FEDERALIST NO. 78, *supra* note 87, at 466 (quoting 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 181).

89. *See id.* at 469 (“If [courts] should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.” (emphasis in original)).

90. *See Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989) (setting out substantive policy goals).

91. Simon-Kerr & Sturm, *supra* note 78, at 85.

92. *Id.*

93. *Id.*

94. William N. Evans et al., *The Impact of Court-Mandated School Finance Reform, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 72, 75 (Helen F. Ladd et al. eds., 1999) (citing R.L. Manwaring & S.M. Sheffrin, *Litigation, School Finance Reform, and Aggregate Educational Spending*, 4 INT’L TAX & PUB. FIN. 107 (1995)).

education finance reforms greatly reduced inter-district inequalities as well.⁹⁵

The adequacy movement gained steam largely because it is relatively modest compared to the demands of the equity movement.⁹⁶ This, however, means that there is also an outside limit to how far courts are willing to go, or how often they are willing to act. If a state is already providing the constitutionally-required education, the case for judicial intervention becomes less compelling. That a desired reform might make a state's school system "better" (from the plaintiffs' perspective) does not necessarily justify judicial intervention. State education clauses set a minimum threshold that must be met.⁹⁷ Those thresholds should be enforced by the courts. They do not, however, create a free-flowing license for judicial intervention any time there is a policy disagreement.

Of course, there remains significant debate over just how much money matters to educational outcomes. Michael Rebell⁹⁸ has argued that in the cases where plaintiffs have prevailed, "the courts determined explicitly or implicitly that 'money matters.'"⁹⁹ In contrast, however, in most of the cases in which defendants have prevailed, "the courts did not discuss expenditure/education outcome correlations at all."¹⁰⁰ Those courts

95. See *id.* at 77 (indicating that reforms stemming from court decisions have resulted in increased spending in poor and median districts while leaving spending in higher wealth districts relatively constant); see also Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES* 175, 186 (Helen F. Ladd et al. eds., 1999) ("Research has shown that in other states where courts have ordered school finance reform, school spending has gone up. Essentially, the judiciary has forced a leveling up of lower-spending districts.") (citing W.S. Evans et. al, *Schoolhouses, Courthouses, and Statehouses after Serrano*, 16 J. POL'Y ANALYSIS & MGMT. 10, 10-31 (1997)).

96. See generally Quentin A. Palfrey, *The State Judiciary's Role in Fulfilling Brown's Promise*, 8 MICH. J. RACE & L. 1, 16-24 (2002).

97. See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991); Molly A. Hunter, *State Constitution Education Clause Language*, EDUCATION JUSTICE, <http://www.edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf> [<https://perma.cc/Y6MF-45JJ>].

98. Michael A. Rebell is professor of practice in law and educational policy at Teachers College, Columbia University, and an adjunct professor at Columbia Law School. Michael A. Rebell, *The Courts' Consensus: Money Does Matter for Educational Opportunity*, 674 ANNALS 184, 184 (Oct. 25, 2017).

99. *Id.* at 191.

100. *Id.*

have tended to focus on other questions, like the separation of powers and comity between the branches of state government.¹⁰¹

In any event, it seems clear that the right to an adequate or equal education “need not be defined solely in monetary terms.”¹⁰² Indeed, I have argued before that it should not be.¹⁰³ School finance lawsuits often seek to compensate for the shortcomings of other impact litigation, like desegregation lawsuits. The corollary also is true, that other types of lawsuits may seek to overcome the perceived inadequacy of school finance reform.¹⁰⁴ We have seen an uptick in such cases as plaintiffs have shifted their focus from educational inputs, like money, to educational outputs and student performance.

Just as the move from the second wave to the third wave was prompted (at least in part) by strategic necessity, “there appears to be an emerging educational rights litigation movement that strategically departs from the third-wave focus on educational funding and educational finance systems.”¹⁰⁵ These new cases focus “on outcomes rather than such inputs as race and resources.”¹⁰⁶ These cases “thrust[] education litigants deeper into the education enterprise” because student achievement is the desired outcome.¹⁰⁷ Rather than focusing on broad, statewide funding schemes, the emphasis is instead on narrow, identifiable policies that allegedly result in harms to specific groups of students.¹⁰⁸

Thus, where the emphasis historically has been on money, a visible shift has emerged toward challenging policies such as teacher tenure laws,¹⁰⁹ instructional minutes,¹¹⁰ and uneven access to advanced placement

101. *Id.* (“In these cases, the courts upheld the defendants’ position by applying separation-of-powers principles and holding that school-funding issues should be determined by the legislative and executive branches rather than by the courts . . .”).

102. James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 532 (1999).

103. *Rethinking*, *supra* note 3, at 580 (citing Ryan, *supra* note 102, at 532).

104. *See, e.g., Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996).

105. Koski, *supra* note 8, at 1915.

106. Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2421 (2004).

107. *Id.*

108. *See* Koski, *supra* note 8, at 1915–16.

109. *See id.* at 1920–21 (discussing challenges in California, New York, Minnesota, and New Jersey to teacher tenure rules and “last in, first out” reduction-in-force rules on the grounds that they deny economically disadvantaged children equal protection).

110. *See id.* at 1916 & n.84 (discussing a California class action challenging an alleged lack of instructional minutes).

courses.¹¹¹ Even in the context of a traditional school finance challenge, some have argued that a state's system is "qualitatively inefficient" because it places a statutory cap on charter schools and imposes excessive regulations on traditional public schools.¹¹²

These lawsuits present a new series of questions about the judiciary's role in education policy. Is it really a court's job to decide whether students should receive greater access to advanced placement courses? Are these types of questions qualitatively different from deciding whether or not a funding system provides a constitutionally-required minimum level of educational opportunities? Arguably, weighing in on discreet policies is less "activist" than ruling a state's school funding scheme unconstitutional. Nonetheless, making education policy may be beyond the scope of the judiciary's proper role.

III. HOW HAVE COURTS BALANCED THE SEPARATION OF POWERS IN SCHOOL FINANCE LITIGATION?

When I looked at these issues in 2004, I concluded that many school finance cases "have failed to balance the principles of judicial review and separation of powers."¹¹³ I found the case law often followed one of two approaches, which William Thro¹¹⁴ referred to as "judicial activism and judicial abdication."¹¹⁵

This language may sound harsh. When I borrowed these terms from Thro, however, I hoped to capture two different concepts. By judicial activism, I meant that some courts had gone beyond the constitutional language in front of them—in some cases *well beyond* that language—and substituted their own policy preferences for those of the legislature. By judicial abdication, I meant that some courts failed to provide adequate judicial review and therefore failed to enforce constitutional mandates that were found within their states' relevant provisions.¹¹⁶

111. See *id.* at 1916-17 & n.85 (discussing a California class action seeking equal access to advanced placement courses).

112. See *id.* at 1921 & n.109 (discussing Texas litigation challenging a statutory cap on charter schools, alleging "over-regulation of traditional public schools," and challenging the ability of districts to reject transfer students from underperforming schools).

113. *Rethinking*, *supra* note 3, at 585.

114. William Thro is the General Counsel of the University of Kentucky and previously served as Solicitor General of Virginia. *William Thro*, UK LAW, <https://www.uky.edu/legal/william-thro> [https://perma.cc/SB88-9TEC].

115. *Rethinking*, *supra* note 3, at 585-86 (citing Thro, *supra* note 10, at 530, 532).

116. Thro's definitions of these terms appear congruous with my usage. According to Thro, judicial abdication has taken two forms. "First, some courts have held that questions of educational quality are non-justiciable. This is incorrect. While courts are not competent

There was no shortage of cases fitting either of these patterns. Courts in numerous states applied a quality standard, or in some cases found a fundamental right to education, even though their constitutional provisions contained no such standard.¹¹⁷ Other courts declined to make such findings, even though their constitutional provisions *did* contain such standards or otherwise suggested that education is a fundamental right.¹¹⁸ At the time, I suggested a third approach, which I believed would better balance the principles of judicial review and the separation of powers.¹¹⁹

The distinctions between “judicial activism” and “judicial restraint,” and even “judicial abdication,” are not theoretical. Examples of each are found throughout case law—significant cases that have real-world impacts on students and on states’ fiscal and tax policies (which in turn impact the states’ abilities to provide for other social services). Thus, when I wrote about this subject before, I provided examples of cases that exemplified activism, on one hand, and an overly aggressive version of judicial restraint, on the other.¹²⁰ Those cases stood as a stark reminder that many courts are outcome-oriented, and that some will reach a desired outcome regardless of the fact patterns and constitutional questions in front of them.

For example, in 1997, the Vermont Supreme Court addressed an equity challenge to the state’s school funding system in *Brigham v. State*.¹²¹ The court struck down the state’s school funding scheme and created its own substantive benchmarks for education policy.¹²² It did this despite interpreting one of the weaker education clauses in the nation.

Many state constitutions contain mandates that their systems be “thorough and efficient” or “uniform.”¹²³ Vermont’s education clause, by

to create their own educational standards, they are perfectly capable of applying a standard created by another branch.” Thro, *supra* note 11, at 546–47. “Second, some courts, while articulating a standard, have adopted a standard that is relatively easy to meet.” *Id.* at 547. “On the judicial activist side,” Thro is critical of decisions “where the court created its own standard and set that standard extremely high.” *Id.*

117. These decisions included cases in Alabama, Arizona, Connecticut, Massachusetts, Nebraska, New York, North Carolina, Tennessee, and Vermont. *See id.* at 540–41.

118. *Id.* at 542 (discussing cases in Georgia and Illinois).

119. *See Rethinking*, *supra* note 4, at 586.

120. *See id.*

121. 692 A.2d 384 (Vt. 1997).

122. *Id.* at 386, 397.

123. For example, at least eight state constitutions mandate a “thorough and efficient” system of free public schools. These include Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, South Dakota, West Virginia, and Wyoming. Seven additional states require either “thorough” or “efficient.” These include Arkansas, Colorado, Delaware, Idaho, Illinois, Kentucky, and Texas. YUDOF ET AL., *supra* note 50, at 810; *see also supra* notes

contrast, states only “a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth.”¹²⁴ Arguably, the words “ought to be maintained” are aspirational and do not contain a mandate at all. This clause also is notable for its legislative “escape hatch.” Even if the clause could be construed as a mandate, it does not apply at all if the Vermont general assembly “permits other provisions” in its place.¹²⁵

The facts in *Brigham* also were less than compelling. Plaintiffs from lower-wealth districts asserted that the state’s school funding system denied them equal opportunities compared to students from wealthier districts.¹²⁶ They did not allege that the system was fundamentally inadequate or failed to impart basic skills,¹²⁷ and the distinction between the wealthiest and poorest districts was far less stark than many other states.¹²⁸ The case had come before the Vermont Supreme Court on appeal of a summary judgment order, so plaintiffs had not developed a factual record establishing that the state’s funding scheme was inadequate.¹²⁹

With this legal and factual backdrop, the *Brigham* court not only ruled for the plaintiffs, but found that no legitimate government purpose could justify the state’s inter-district spending differences.¹³⁰ The court also used the lawsuit as a vehicle for setting substantive benchmarks for

21, 23–26 and accompanying text (discussing examples of state education clauses with such mandates).

124. VT. CONST. ch. II, § 68.

125. *Id.*

126. 692 A.2d at 386; see also Michael A. Rebell & Jeffrey Metzler, *Rapid Response, Radical Reform: The Story of School Finance Litigation in Vermont*, 31 J.L. & EDUC. 167, 171–72 (2002) (stating that the plaintiffs’ primary claim was that Vermont’s education finance system deprived students of their right to equal educational opportunities).

127. *Brigham*, 692 A.2d at 387.

128. In some states, the ratio of education spending between “property-rich” and “property-poor” districts reached as high as nine-to-one. See, e.g., Farr & Trachtenberg, *supra* note 66, at 615 (discussing the disparities between districts in Texas). Vermont, by contrast, had a ratio of roughly two-to-one at the time of the *Brigham* decision. See Rebell & Metzler, *supra* note 126, at 169. To be clear, as a legislator I would support policies designed to improve parity in either case. However, compared to other states, Vermont’s situation does not seem to warrant such robust judicial interventionism.

129. See Rebell & Metzler, *supra* note 126, at 176 (“*Brigham v. State* never went to trial.”); see also *id.* at 177 (“Issued only four months after initial filing, [*Brigham*] invalidated the entire state education funding system on the basis of a motion for summary judgment.”).

130. See 692 A.2d at 396 (stating that “we are simply unable to fathom a legitimate governmental purpose to justify” the state’s inter-district inequalities in school funding).

education policy, including preparing students to participate in democratic self-government and to compete in a “global marketplace.”¹³¹

As a policymaker, I see some value in those benchmarks. Whatever their merits, though, they are not found within Vermont’s education clause. There is little in the Vermont Constitution to suggest that the state’s highest court should issue such a sweeping decision. The relevant question, for separation of powers concerns, is whether the court actually has the responsibility and authority for this type of ruling. It is not enough that the court is instituting a policy that we might agree with.¹³²

Right around the same time, in 1996, the Illinois Supreme Court issued a ruling that is arguably at the other end of the activism/restraint spectrum. In *Committee for Educational Rights v. Edgar*, the court rejected a challenge to Illinois’ school funding system and found that such issues lie “solely” within the purview of the legislature.¹³³ The court did this despite interpreting a much stronger constitutional mandate, and assessing a more compelling fact pattern than what the Vermont court faced the following year in *Brigham*.

The Illinois Constitution lists the “educational development of all persons” as a “fundamental goal” of the state.¹³⁴ It requires “an efficient system of *high quality* public educational institutions and services.”¹³⁵ Illinois’ education clause also imposes “primary responsibility for financing the system of public education” directly upon “the State.”¹³⁶

Hoping to enforce these seemingly strong requirements, the *Edgar* plaintiffs alleged that the state’s funding scheme was unduly reliant on local property taxes, and that this led to wide disparities in resources between school districts.¹³⁷ In the 1989–90 school year, for example, the average tax base in the wealthiest ten percent of elementary schools was over *thirteen*

131. *Id.* at 396–97.

132. As with many of these cases, the results of *Brigham* were mixed. The Vermont legislature responded to the court’s decision with reforms that replaced most local property taxes with a statewide property tax. The state also initiated a “sharing pool,” where districts that chose to impose a local tax (to provide additional support beyond the state minimum) were required to give a portion of their revenues to property-poor districts. *See* Rebell & Metzler, *supra* note 126, at 167, 179–82. Most of Vermont’s school districts received additional funding under the new scheme. Taxes more than doubled in the wealthiest districts, however, and per-pupil spending in those districts actually decreased. *Id.* at 182.

133. 672 N.E.2d 1178, 1189 (Ill. 1996).

134. ILL. CONST. art. X, § 1.

135. *Id.* (emphasis added).

136. *Id.*

137. 672 N.E.2d at 1182.

times the average tax base in the poorest ten percent.¹³⁸ The ratio of the average tax bases in the wealthiest and poorest high school districts was more than eight-to-one.¹³⁹

In assessing the plaintiffs' claims, the Illinois Supreme Court acknowledged that courts in other jurisdictions had found violations of less stringent state constitutional standards, such as "thorough" or "efficient."¹⁴⁰ Nonetheless, the *Edgar* court held that the question of whether Illinois educational institutions were "high quality" is "outside the sphere" of the judicial function.¹⁴¹ The court emphasized the limits of its role, stating that education is not "a subject within the judiciary's field of expertise" and that it would be "conceit" for the court to develop education quality standards.¹⁴²

A. *Does Constitutional Language Determine Litigation Outcomes?*

To a reasonable observer, the courts' decisions in *Brigham* and *Edgar* might raise the question of whether constitutional language actually determines litigation outcomes. On their face, the examples of Vermont and Illinois may appear to be outliers. One involved a court issuing an "equity" ruling, despite interpreting a weak constitutional provision and having few facts to support its holding.¹⁴³ The other involved a court holding plaintiffs' challenge non-justiciable despite a strong constitutional mandate and an equally strong fact pattern.¹⁴⁴ While these may be more stark than other cases, *Brigham* and *Edgar* are symptomatic of a larger divergence between constitutional language and litigation outcomes.

As others have noted, "the willingness of a court to hold an educational system unconstitutional has not always been consistent with [the perceived strength] of that state's education clause."¹⁴⁵ To the contrary, observers have found that "constitutional language seems to have had little

138. *Id.*

139. *Id.*

140. *Id.* at 1191-92.

141. *Id.* at 1193.

142. *Id.* at 1191.

143. *Brigham v. State*, 692 A.2d 384, 397 (Vt. 1997) (holding "that to fulfill its constitutional obligation the state must ensure *substantial* equality of educational opportunity throughout Vermont" (emphasis added)).

144. *Edgar*, 672 N.E.2d at 1193 (holding "that the question of whether educational institutions and services in Illinois are 'high quality' is outside the sphere of the judicial function").

145. Brooker, *supra* note 6, at 201.

effect on certain case outcomes.”¹⁴⁶ Thus, a number of state courts have imposed a “quality” standard “despite the fact that their state constitutions do not contain one.”¹⁴⁷

This divergence between constitutional language and litigation outcomes can be seen in some of the most pivotal cases in the nationwide school finance movement. In the case that kicked off the “third wave,” *Rose v. Council for Better Education*,¹⁴⁸ the Kentucky Supreme Court went well beyond the state’s constitutional language. Kentucky’s education clause requires only that the General Assembly “provide for an efficient system of common schools throughout the State.”¹⁴⁹ This is fairly weak when compared to other states’ education clauses. Yet, the Kentucky Supreme Court relied on this provision in setting its own qualitative standards for the state’s education system.¹⁵⁰

The Kentucky Supreme Court’s judicially-prescribed standards bear little relation to the constitutional language and only indirectly relate to questions of school finance. According to the *Rose* court, an educated child must demonstrate “at least the seven following capabilities:”

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school

146. William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1087 (2004) [hereinafter *Politics of Judicial Decision-Making*]; see also *id.* at n.30 (“To date, courts often have ignored the meaning of the text [of their own constitutions] and/or the decisions from other states.” (quoting Thro, *supra* note 10, at 540)).

147. Bess J. DuRant, *The Political Question Doctrine: A Doctrine for Long-Term Change in Our Public Schools*, 59 S.C. L. REV. 531, 535–36 (2008); see also *id.* at 536 n.38 (collecting cases).

148. 790 S.W.2d 186 (Ky. 1989).

149. KY. CONST. § 183.

150. Compare *supra* notes 22–26 and accompanying text.

students to compete favorably with their counterparts in surrounding states, in academics or in the job market.¹⁵¹

Let me be clear: I support these goals, and I agree that some variation of them ought to be considered by policymakers like legislators or boards of education. We want our children to make informed decisions, understand our government, be mentally and physically well, and compete well in the job market. I doubt many people would disagree with those aspirations. These are not, however, required by the text of the Kentucky Constitution's education clause. Nor do they provide enforceable standards related to school finance. These are vague aspirations—policy goals—superimposed by the state supreme court onto the state constitution. They are judicial policymaking.

The activist nature of this decision was amplified by later courts' reliance on its holding. For example, the Kentucky Supreme Court's judicially-created standards were adopted wholesale by the Massachusetts Supreme Court a few years later.¹⁵² It was a different court, facing a different set of facts, interpreting a different constitutional provision.¹⁵³ Yet the outcome from one state was adopted by the other. As both an attorney and a legislator, I am skeptical that the meaning of the Massachusetts education clause happens to so closely correspond with the contemporaneous decision of a different state court interpreting a different constitutional provision.

It bears repeating that the divergence between constitutional language and outcomes is not limited to courts that are "activist." Another example of a court arguably failing to provide adequate judicial review can be found in *Pawtucket v. Sundlun*, in which the Rhode Island Supreme Court considered a challenge to that state's school funding scheme.¹⁵⁴ The text of Rhode Island's constitutional mandate is among the strongest in the nation. It indicates that knowledge and virtue are "essential for the preservation of [the people's] rights and liberties" and declares it the legislature's "duty" to promote public schools to "secure to the people the advantages and opportunities of education."¹⁵⁵ Notwithstanding this

151. 790 S.W.2d at 212.

152. See *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993) (citing *Rose*, 790 S.W.2d at 212).

153. The Massachusetts Constitution requires that the legislature "cherish the interests of literature and the sciences . . . [and] encourage private societies and public institutions, rewards and immunities . . ." MASS. CONST. pt. 2, ch. 5, § 2.

154. 662 A.2d 40 (R.I. 1995).

155. R.I. CONST. art. XII, §1.

language, the *Sundlun* court rejected the plaintiffs' challenge on the basis that the legislature has "virtually unreviewable discretion in this area."¹⁵⁶

The Rhode Island Supreme Court's decision sticks out because it seems to lay the groundwork for judicial intervention, before holding that such intervention is beyond the court's authority. The court specifically recognized that it is "the province and duty of the judicial department to say what the law is."¹⁵⁷ Likewise, the court acknowledged that "the right to an education is a constitutional right" in Rhode Island.¹⁵⁸ Nonetheless, the court held that the state legislature, and the legislature alone, is responsible for enforcing that right. "[P]laintiffs have asked the judicial branch to enforce policies for which there are no judicially manageable standards."¹⁵⁹ Thus, "the proper forum for this deliberation is the General Assembly, not the courtroom."¹⁶⁰

I am not suggesting that all court decisions reflect the disconnect that we see in *Brigham*, *Edgar*, *Rose*, or *Sundlun*. Some courts are undoubtedly called on to interpret middle-of-the-road constitutional provisions and are faced with fact patterns that tend to support the courts' holdings. It concerns me, however, that so many courts appear to be outcome-driven.

B. What About the Separation of Powers?

To the extent that people are looking at the interplay between constitutional language and litigation outcomes, the literature tends to focus on states' education clauses.¹⁶¹ These clauses generally form the basis (or at least one of the bases) for modern school finance lawsuits.¹⁶² It is worth considering, however, that many states also have constitutional language that deals directly with the separation of powers.¹⁶³ Yet the

156. 662 A.2d at 57.

157. *Id.* at 59 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

158. *Id.* at 57.

159. *Id.* at 58.

160. *Id.*

161. Brooker, *supra* note 6, at 183 ("Over time, the focus in school finance litigation has shifted from equality, which focuses on broad equal protection clause principles, to adequacy and minimum quality standards, which focuses primarily on narrow, state constitution specific education clauses.").

162. See Aaron Y. Tang, *Broken Systems, Broken Duties: A New Theory for School Finance Litigation*, 94 MARQ. L. REV. 1195, 1206-11 (2011) (discussing the "adequacy theory" for lawsuits targeting the education clauses present in state constitutions).

163. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 337 (2003) ("As of 1998, forty state constitutions contained express separation-of-powers requirements.").

strength of these provisions also is not an accurate predictor of litigation outcomes.

Professor Scott Bauries¹⁶⁴ has attempted to measure the correlation between “the explicitness of a state’s constitutional text relating to separation of powers and the decision of the state’s courts whether to engage in merits adjudication of educational adequacy claims.”¹⁶⁵ Despite the “near-ubiquitous consideration of separation of powers principles in the cases,” Professor Bauries found “no evidence of any association between these two variables.”¹⁶⁶ To the contrary, he found that whether the separation of powers provisions of a particular state’s constitution are explicit or implicit “is of no help whatsoever in predicting the extent to which the state’s highest court will engage in or approve merits review or remediation of an alleged constitutional violation.”¹⁶⁷

For those concerned about the separation of powers, or about limiting the role of the judiciary in policymaking, these patterns are disconcerting. First, as discussed above, even in pivotal cases there is an apparent disconnect between the strength of education clauses and litigation outcomes.¹⁶⁸ Second, according to Professor Bauries, there is also no correlation between the provisions relating directly to the separation of powers and state courts’ decisions to reach the merits in such cases.¹⁶⁹ Both of these are counterintuitive. One should reasonably expect that the language of these constitutional provisions would be among the factors *most highly correlated* with litigation outcomes.

So how and why do courts reach the results that they do? Academic analysis suggests a variety of factors in addition to the constitutional language and the facts before the court. These include, unsurprisingly, judges’ political partisanship and their personal and professional backgrounds.¹⁷⁰ Observers have also pointed to a host of other factors that

164. Scott Bauries is a Professor of Law at the University of Kentucky. *Scott R. Bauries*, UK LAW, <http://law.uky.edu/directory/scott-r-bauries> [https://perma.cc/5H2J-W626].

165. Bauries, *supra* note 9, at 701.

166. *Id.*

167. *Id.* at 744–45.

168. *Id.* at 712–13 (“[L]ittle scholarship has been able to identify a relationship between the language of a state constitution’s education clause and the outcome of education finance litigation in that state.”).

169. *Id.* at 744–45 (evaluating the results of an analysis showing there is no correlation between the explicitness of the state constitution’s separation of powers provision and the court’s decision to reach the merits).

170. Chia & Seo, *supra* note 18, at 138 (“Studies have connected judges’ political partisanship to the varying outcomes in adequacy cases in different states”). *See*

may affect judicial behavior, including “a judge’s underlying judicial philosophy, the selection process and tenure of state judges, and a judge’s perception of institutional constraints.”¹⁷¹

Professor William Koski¹⁷² has compared Ohio’s late 1990s school finance litigation with contemporaneous litigation in Wisconsin and considered “the political environment” surrounding the courts’ decisions.¹⁷³ At first glance (and assuming relatively similar fact patterns), one might predict that these cases would have similar outcomes. In each state, courts had previously rejected a challenge to that state’s school funding scheme.¹⁷⁴ The states had similar populations, which Professor Koski describes as “modestly diverse,” with similar geographic distributions.¹⁷⁵ Each state had a diversified economy, and each had a Republican governor opposed to judicial intervention.¹⁷⁶ As Koski points out, however, “the results in the two states’ cases were quite different, as the Ohio Supreme Court struck down its state’s school finance scheme, while the Wisconsin Supreme Court upheld its scheme.”¹⁷⁷

What explains this difference? Koski concludes (with some justification, in my view) that differences in judicial attitudes and political environments resulted in different outcomes. His conclusion is almost self-explanatory: “a more liberal and activist judiciary is more likely to find unconstitutional the state’s educational finance policy.”¹⁷⁸ As an attorney, I would like to believe that differing outcomes were due to factual distinctions between the cases, or some nuanced distinctions between the constitutional language that each court was addressing.¹⁷⁹ Litigants should certainly hope and expect that this is how cases are decided. Nonetheless, Koski’s analysis seems to confirm what most of us intuitively know (or at

generally Politics of Judicial Decision-Making, *supra* note 147, at 1088–04 (discussing factors, including politics, that effect judges’ decision-making in school finance cases).

171. Chia & Seo, *supra* note 18, at 138.

172. William Koski is an Associate Professor of Law at Stanford Law School. *Politics of Judicial Decision-Making*, *supra* note 146, at 1077 n.1.

173. *See id.* at 1083.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. The Ohio and Wisconsin education clauses are each of intermediate strength and specificity, compared to other states. *See* OHIO CONST. art. VI, § 2 (“The general assembly shall . . . secure a thorough and efficient system of common schools throughout the State”); WIS. CONST. art. X, § 3 (“The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children”).

least think we know): judges' political views and policy preferences weigh on their decisionmaking and affect their willingness to substitute their judgment for that of the legislature.

IV. WHERE SHOULD COURTS DRAW THE LINE?

The approaches followed in the examples above are not, in my view, representative of the proper relationship between the branches of government. It is basic civics that the legislature is charged with making the law, the executive branch with carrying out and enforcing the law, and the judiciary with interpreting the law.¹⁸⁰ Yet it is difficult to explain cases like *Rose* and *Brigham* as merely “interpreting” the law. Likewise, a court has arguably failed to interpret the law when it sidesteps an issue as non-justiciable, as the courts did in *Edgar* and *Sundlun*.¹⁸¹

I have argued in the past for what I have described as a “middle ground” approach, which I believe better balances the competing responsibilities of each branch of state government.¹⁸² Professor Bauries has described this as a “passive dialogic” approach because it involves a back-and-forth between the court and the legislature but puts an outer limit on the court's ability to make public policy or otherwise command specific legislative action.¹⁸³ Under this approach the court could find a school funding system unconstitutional, but would refrain from ordering a specific remedy that pushes the court into the realm of policymaking.

My overall proposition was simple: each branch of government should stay within its own lane. It is the legislature's job to make policy. It is the court's job to interpret the laws and determine if the legislature is

180. See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (“To the legislative department has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts.”); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) (“[T]he legislature makes, the executive executes, and the judiciary construes the law . . .”).

181. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (“So if a law be in opposition to the constitution; . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”).

182. See generally *Rethinking*, *supra* note 3, at 597–607 (discussing the role of the judiciary branch in relation to school finance).

183. See Bauries, *supra* note 9, at 725 & n.129, 727–28. See generally Michael Heise, *Preliminary Thoughts on the Virtues of the Passive Dialogue*, 34 AKRON L. REV. 73, 76–84 (2000) (providing a detailed description and examples of “passive judicial participation” and “active judicial participation”).

meeting its constitutional mandate. When courts go beyond that, they exceed both their proper role and their institutional competence.¹⁸⁴

This does not mean that a court should never find a system unconstitutional. To the contrary, if the citizens' constitutional rights are not being enforced, courts must "say what the law is and . . . direct the popularly elected officials back to the proper course."¹⁸⁵ However, the court should be mindful to avoid both types of activism seen in school finance cases. The first occurs when a court goes beyond the plain meaning of the constitutional provision the court is considering. The second, which is no less significant, occurs when a court answers questions or decides issues not properly before it by going beyond the scope of the case or controversy presented by the pleadings.

How does one balance the proper roles of each branch? I offered some basic guidelines. First, a court "should examine the constitutional text and determine . . . whether their state's constitution sets a quality standard."¹⁸⁶ Second, *if* the state constitution sets a quality standard, the court should "determine what that standard is, and whether the state's system meets its burden."¹⁸⁷ The court has the duty to review legislative acts and determine the limitations or requirements of the state constitution. It is a court's duty "to declare all acts contrary to the manifest tenor of the Constitution void."¹⁸⁸ A court should not abandon that duty to determine whether or not the legislature has complied with the state constitution.¹⁸⁹

Finally, I have argued that courts should limit their decisions to the question of constitutionality and should be wary of imposing court-ordered remedies.¹⁹⁰ When courts fashion remedies for a statewide school finance system, they run the risk of setting substantive public policy in the areas of education, taxation, and spending. Yet courts lack the authority to exercise

184. See *Rethinking*, *supra* note 3, at 597-98 ("Judges . . . are trained and work in the interpretation of law—not in the formation of public policy. School finance is not—nor should it be—a judge's area of expertise.").

185. Thro, *supra* note 10, at 528; see also DuRant, *supra* note 147, at 535 ("The fundamental duty of the judiciary is to say what the law is rather than what the law should be.").

186. *Rethinking*, *supra* note 3, at 605.

187. *Id.*

188. THE FEDERALIST NO. 78, *supra* note 87, at 466.

189. See *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1203 (Ill. 1996) (Freeman, J., concurring in part and dissenting in part) ("[T]he judicial role of construing the constitution and determining if it has been violated is essential to our form of government.").

190. *Rethinking*, *supra* note 3, at 605 ("Limiting decisions to the issue of constitutionality—and not remedies—would help courts restore the proper balance of judicial authority.").

legislative powers, and they lack the institutional competence to make the policy decisions involved in reforming an education system.

William Thro has proposed that courts go a step further than this but stay within a similar framework. Rather than abstaining from remediation altogether, Thro argues that courts should leave remedies to the other branches of government, but that courts should give guidance to those branches on how to remedy the violation.¹⁹¹ Professor Bauries has called this an “active dialogic” approach.¹⁹² Under this approach, a court would essentially find a system unconstitutional, then explain the changes that would be necessary to bring the system into compliance.¹⁹³

While there is a difference between the “passive dialogic” and “active dialogic” approaches, they are really two sides of the same coin. Each is more respectful of the separation of powers than the alternative path of a court-ordered remedy. Thus, both Professor Bauries and Professor Joshua Weishart have argued that different strands of the “dialogic” approach converge toward “a rough consensus that, once the merits are adjudicated, courts should abstain from ordering or compelling any specific, judge-made remedial measures, but should instead engage in dialog with the coordinate branches to encourage reform.”¹⁹⁴

A. *Do Courts Need to Prescribe a Remedy in Order to Effect Change?*

From a plaintiff’s perspective, one practical problem with my proposed approach (or even with Thro’s more “active” approach) is that it does not provide for a strong remedy if the legislature refuses to improve an unconstitutional system. As Professor Bauries pointed out, this approach does not “address what the judiciary’s proper role might be if the state legislature were to fail to act to remedy its own violation of the state constitution.”¹⁹⁵

191. See Thro, *supra* note 10, at 550–52.

192. Bauries, *supra* note 9, at 726 (discussing Thro’s “active dialogic” approach).

193. See Thro, *supra* note 10, at 552. Thro’s approach is similar to my own, and his writings obviously influenced my thinking about this subject. I would argue, however, that “admonishing” a legislature to act, while telling the legislature what actions would be acceptable, also intrudes upon the legislative function. Although this is less of an intrusion than court-imposed education or spending policies, as a legislator, I find those outcomes to be separated only by degree. I do not view a proverbial sword hanging over the legislature’s head—complete with a judicially-recommended escape hatch—as philosophically distinct from the court ordering its own remedy.

194. Joshua E. Weishart, *Equal Liberty in Proportion*, 59 WM. & MARY L. REV. 215, 273 (2017) (quoting Bauries, *supra* note 9, at 733).

195. Bauries, *supra* note 9, at 727.

This is a fair criticism. However, there are limits to each branch's authority. The separation of powers aims to divide responsibilities in order to protect the people from overreach and to ensure that no one branch is superior to the others.¹⁹⁶ I believe that it is important to maintain that balance of powers. If there must be a dividing line between activism and restraint, I land on the side of maintaining this division and stopping any one branch from subsuming the roles of the others.

Many people undoubtedly draw that line in a different place than I do. It bears emphasizing that the framers of the various state constitutions *did* envision mechanisms for resolving breakdowns in the political system. Those mechanisms involve public pressure from legislators' constituents, criticism by citizens or the press, and regular elections where legislators are judged (at least in part) for their responsiveness to such issues.

Make no mistake, a state supreme court finding that the school finance system is unconstitutional creates substantial pressure to improve the state's system. Most legislators are responsive to such pressures (and even less significant pressures than those presented here). Indeed, successful school finance lawsuits generally have had a significant, positive effect on their states' funding, whether due to court orders or political pressures.¹⁹⁷ The response may not be precisely what the plaintiffs (or even the courts) want, but a finding of unconstitutionality spurs action.

Some may take issue with this and doubt my conclusions. Recent scholarship has suggested, for example, that "[i]t is not enough to find a violation of [a state's] education clause. To ensure real change, the court must prescribe a remedy."¹⁹⁸ To this, I respond that I have faith in our political system, at least when schools and education are involved. These issues resonate strongly with voters. Candidates who ignore systemic problems with the education system do so at their own political peril.

196. See THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) ("[A]ll the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments.").

197. See, e.g., *Rethinking*, *supra* note 3, at 584 (noting that according to econometric analysis, "in states that have found their school finance systems unconstitutional, subsequent reforms have led to a 23 percent average increase over what would have occurred . . ."); see also Rothstein, *supra* note 42, at 73.

198. Lauren A. Webb, *Educational Opportunity for All: Reducing Intradistrict Funding Disparities*, 92 N.Y.U. L. REV. 2169, 2204 (2017) (alteration in original).

B. *Ohio's Experience and the Middle Ground*

As a partial rebuttal to critics of the “passive” approach, I point to Ohio’s experiences following *DeRolph v. State*, in which the Ohio Supreme Court found the state’s funding system unconstitutional.¹⁹⁹ The case was controversial, as many of these cases undoubtedly are, and I do not seek to re-litigate its merits here.²⁰⁰ However, I believe that *DeRolph* approaches the “middle ground” that I have proposed, and *DeRolph* could serve as an example to other courts.

DeRolph was an adequacy challenge brought in the 1990s by a coalition of Ohio school districts and individuals.²⁰¹ In prior decades, the Ohio Supreme Court had already defined the contours of the “thorough and efficient” standard found in the state’s education clause.²⁰² In the 1920s, the court held that maintaining a thorough and efficient system of public education was a statewide purpose, rather than a local one.²⁰³ Under this precedent, school districts could not be “starved for funds” or “lack[] teachers, buildings, or equipment.”²⁰⁴ The court also had indicated in the 1970s that the state legislature has broad discretion in enacting a school finance system, but that the court would have a duty to declare a funding scheme invalid if it did not meet the requirements of the Ohio Constitution.²⁰⁵ Thus, prior to hearing *DeRolph* in the 1990s, the Ohio Supreme Court had already determined that the state constitution sets a quality standard and gave some contours as to what that standard includes.

199. 677 N.E.2d 733, 737 (Ohio 1997) [hereinafter *DeRolph I*].

200. Arguments against the majority’s holding are found in Chief Justice Thomas Moyer’s dissents to *DeRolph I* and *DeRolph II*. Moyer argued that the majority’s decisions were “legally unwarranted and inappropriate.” *DeRolph v. State*, 728 N.E.2d 993, 1035 (Ohio 2000) (Moyer, C.J., dissenting) [hereinafter *DeRolph II*]. In addition to presenting separation of powers concerns, Chief Justice Moyer noted that much of the evidence presented was anecdotal and not systematic. “[P]roblems in individual schools do not . . . demonstrate a failure of the statewide system of common schools as a whole.” *Id.* at 1031.

201. *DeRolph I*, 677 N.E.2d at 734.

202. See OHIO CONST. art. VI, § 2. The state’s education clause requires that “The General Assembly shall . . . secure a thorough and efficient system of common schools throughout the State”

203. See *Miller v. Korns*, 140 N.E. 773, 776 (Ohio 1923) (stating that Ohio’s thorough and efficient clause “calls for the upbuilding of a system of schools throughout the state, and the attainment of efficiency and thoroughness in that system is thus expressly made a purpose, not local, not municipal, but state-wide”).

204. *Id.*

205. See *Bd. of Educ. v. Walter*, 390 N.E.2d 813, 823 (Ohio 1979) (“One of the basic functions of the courts under our system of separation of powers is to compel the other branches of government to conform to the basic law.”) (quoting *State ex rel. Scott v. Masterson*, 183 N.E.2d 376, 379 (Ohio 1962)).

In the first of several decisions in *DeRolph*, the Ohio Supreme Court recognized that courts have a duty to determine whether a challenged scheme complies with the state constitution.²⁰⁶ From there, the court reiterated that Ohio's education clause imposes a quality standard. The court applied its prior precedent defining "thorough and efficient."²⁰⁷

The Ohio Supreme Court next determined whether Ohio's school finance system met the burden of the "thorough and efficient" standard. Based upon the factual record, the court found that many districts were "starved for funds" or lacked teachers, buildings, or equipment.²⁰⁸ The court also concluded that some plaintiff districts could not provide the basic resources necessary to educate their students, including textbooks, and that this could lead to poor academic performance.²⁰⁹

Thus, the *DeRolph* court found Ohio's school funding system unconstitutional.²¹⁰ As the court explained, a "thorough and efficient system of common schools includes facilities in good repair and the supplies, materials, and funds necessary to maintain these facilities in a safe manner"²¹¹ Put simply, the court held that the legislature had a duty to provide Ohio students with the opportunity for an adequate education, and that it was not meeting that burden.²¹² Although the court took the unusual step of staying its decision and retaining jurisdiction, it did not demand specific legislation in response.²¹³

The approach followed by the *DeRolph* court avoided the jurisprudential extremes seen in cases like *Brigham* and *Rose*, on one hand, and *Edgar* and *Sundlum*, on the other. The court did not sidestep its responsibility—it held Ohio's system unconstitutional—but it was careful

206. See *DeRolph I*, 677 N.E.2d at 737 ("[T]he function of the judiciary in deciding constitutional questions is not one which it is at liberty to decline.").

207. See *id.* at 747 ("A thorough and efficient system of common schools includes facilities in good repair and the supplies, materials, and funds necessary to maintain these facilities in a safe manner").

208. *Id.* at 745.

209. *Id.* at 744.

210. *Id.* at 737 ("[T]he current legislation fails to provide for a thorough and efficient system of common schools, in violation of Section 2, Article VI of the Ohio Constitution.").

211. *Id.* at 747.

212. See Martha S. West, *Equitable Funding of Public Schools Under State Constitutional Law*, 2 J. GENDER, RACE & JUST. 279, 291 (1999).

213. See *DeRolph I*, 677 N.E.2d at 747 ("The trial court is to retain jurisdiction until the legislation is enacted and in effect, taking such action as may be necessary to ensure conformity with this opinion."); see also *id.* at n.10 ("We grant plenary jurisdiction to the trial court to enforce our decision. This authority includes the right to petition this court for guidance, if the need arises.").

not to engage in the judicial lawmaking undertaken by some other states' courts.

Was *DeRolph* a decision without a remedy? Some have argued that it was.²¹⁴ The Ohio Supreme Court issued four rulings over the course of five years, and ultimately relinquished jurisdiction without finding that the system had complied with the state's education clause.²¹⁵ The legislature made substantial improvements, but it did not undertake the "complete systemic overhaul" envisioned by the court.²¹⁶

I believe, however, that the Ohio Supreme Court largely achieved its goals. The court left it to the legislature to remedy the state's school funding system, rather than ordering specific spending or other mandates. Yet it is beyond serious dispute that the court's rulings spurred substantial legislative action. The legislature responded to the court's initial decision with a flurry of activity, including a new funding formula, increased investment in school facilities, and important accountability measures.²¹⁷ By the time the court relinquished jurisdiction in the case, Ohio had instituted a rational process for determining the cost of an adequate education.²¹⁸ The state also put mechanisms in place to even out the disparities caused by the property tax system.²¹⁹

Was this enough? Or did the lack of a court-ordered remedy render the *DeRolph* litigation a failure? There will always be arguments over increased funding, and the question of whether more can be done. It is

214. See, e.g., Christen Spears Hignett, Comment, *Ohio's Public School Funding System: The Unanswered Questions and the Unresolved Problems of DeRolph*, 33 CAP. U. L. REV. 739, 763 (2005) (arguing that neither the legislature nor the courts "has shown a meaningful intent to solve the problem" of school funding in Ohio); Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 778 (2007) (claiming that "judicial restraint did not improve the education of the generation of children who attended these schools . . .").

215. See *DeRolph v. State*, 780 N.E.2d 529 (2002) [hereinafter *DeRolph IV*]; *DeRolph v. State*, 754 N.E.2d 1184, (2001) [hereinafter *DeRolph III*]; *DeRolph II*, 728 N.E.2d 993 (Ohio 2000); *DeRolph I*, 677 N.E.2d 733. See generally *Adequate Education*, *supra* note 19, at 101–39 (discussing all four of the Ohio Supreme Court's decisions in the *DeRolph* litigation, as well as the legislative response to each).

216. See *DeRolph IV*, 780 N.E.2d at 530; see also *Adequate Education*, *supra* note 19, at 146 (concluding that as a matter of case law, "the mandates of *DeRolph I* and *II* remained unfulfilled" at the time the court relinquished jurisdiction in the case).

217. See *Adequate Education*, *supra* note 19, at 113–18 (discussing the legislative response to *DeRolph I*).

218. *Adequate Education*, *supra* note 19, at 148 ("[Ohio] now has a rational formula for determining the cost of a basic education, and has programs in place to fund those costs. Ohio also now has programs in place to even out the disparities caused by the property tax system.").

219. *Adequate Education*, *supra* note 19, at 148.

undeniable, however, that the *DeRolph* litigation left a lasting legacy across Ohio.

Perhaps even more important than changes to the funding formula was the creation of the Ohio School Facilities Commission (now part of the Ohio Facilities Construction Commission).²²⁰ The Ohio Supreme Court's initial decision focused on unsafe and inadequate facilities and the need for billions of dollars in upgrades or new construction.²²¹ Because of the changes made after *DeRolph*, Ohio has largely rebuilt its schools. Post-*DeRolph* Ohio has invested more than \$11.8 billion in additional facilities spending. This has resulted in the construction or renovation of nearly 1,200 school buildings across the state. To put that in perspective, in 284 districts out of roughly 615 districts statewide, *every building* was either renovated or was newly constructed in the years following *DeRolph*.²²² This is significant and goes to the heart of the court's ruling. In fact, one of the justices who formed the *DeRolph* majority confirmed for me in personal conversations that he regards the state's long-term investments in facilities a major victory for the *DeRolph* plaintiffs and a substantial improvement for the state of Ohio.

This may not be a perfect result, but it is far better than one would believe from reading the academic literature alone. As a policymaker, I find that the rhetoric often does not match reality. It is simply not accurate, for example, to say that the Ohio Supreme Court "gave up and acquiesced to chronic legislative failure"²²³ or that the court's judgment was "not enforceable" and "meaningless."²²⁴ In fact, I think almost the opposite is true. The *DeRolph* court took the procedurally unusual step of keeping

220. See OHIO FACILITIES CONSTR. COMM'N, *Overview and History*, <https://ofcc.ohio.gov/Home/Overview-History> [<https://perma.cc/3NY7-WFWR>] ("The Ohio Facilities Construction Commission is responsible for guiding capital projects for state agencies, state-supported universities and community colleges, and Ohio's comprehensive public K-12 school construction and renovation program.").

221. See *DeRolph I*, 677 N.E.2d 733, 742-46 (Ohio 1997); *Adequate Education*, *supra* note 19, at 105-06 (discussing significant facilities-related problems among the *DeRolph* plaintiff districts, including health and safety concerns in Perry County schools).

222. See OHIO SENATE MAJORITY CAUCUS, EDUCATION QUICK FACTS (June 2018) (on file with author).

223. Davis, *supra* note 6, at 132. Some commentators are even more animated. See, e.g., Elder, *supra* note 215, at 786 ("In Ohio and New Jersey, the courts' unwillingness to push the legislatures harder has condemned millions of children to an education that is less than they deserve based on their state constitutions.").

224. See Hignett, *supra* note 215, at 763 (quoting William Phillis, *Mr. DeRolph Goes to Washington*, THE OHIO COAL. FOR EQUITTY & ADEQUACY OF SCH. FUNDING, <http://www.ohiocoalition.org> (last visited October 20, 2003)).

jurisdiction over the case for several years.²²⁵ Doing so allowed the court to engage in a back-and-forth with the legislature until significant progress had been made and the makeup of the court became more conservative. This back-and-forth “dialogue,” involving several court decisions and multiple legislative responses, led to real-world results for students.

This is not to say that authors of the academic literature intend to mislead. To the contrary, I assume that most observers believe what they say about Ohio’s school funding system, or those of the other states that they write about. I also believe there is room for continued improvement in Ohio’s school funding system. However, the school funding formula is updated every two years, and these changes are often significant. State funding for K-12 education has increased by more than 110 percent in the years following *DeRolph*, more than twice the rate of inflation.²²⁶ There are dozens of other bills related to education introduced in each two-year legislative cycle, and many of those are passed and signed into law. I see those on a daily basis while most people outside the legislature would not, unless they dedicated themselves to following such developments full-time. Few people are able to do so, and in my estimation few who study this issue see the full picture, no matter how much time they put into it.

C. What Does the “Middle Ground” Mean for Emerging Education Litigation?

I continue to believe that the middle ground approach is more respectful of the separation of powers than the approaches followed by the courts in *Brigham*, *Rose*, or *McDuffy*. I also believe that it is more supportive of the peoples’ constitutional rights than the approach used in cases like *Edgar* and *Sundlun*. Courts should say what the law is; that is the very essence of judicial review. Yet they also must remember the constraints of their role, and not venture beyond either their constitutional authority or their institutional competence.

What does this mean for the next generation of education lawsuits? Where there are statutory questions involved, the court should adhere to the normal principles of construction and apply the laws passed by their

225. This step was so unusual, in fact, that on a motion for clarification one of the Justices argued that there was no longer a case or controversy properly before the court. See *DeRolph v. State*, 678 N.E.2d 886, 890 (Ohio 1997) (Cook, J., dissenting) (“There remains nothing more for this . . . court to do. . . . [U]pon the enactment of new laws for school funding, new challenges may be brought.”).

226. See OHIO SENATE MAJORITY CAUCUS, *supra* note 222 (stating that state funds for K-12 education increased 110.1 percent between fiscal year 1997 and fiscal year 2018, while inflation increased by 52.5 percent over that same period).

respective legislatures. In the constitutional context, courts must remain mindful of their limitations. Do the states' various education clauses require specific outcomes for challenges to educational minutes, advanced placement course availability, or teacher tenure laws? Do they prohibit a certain level of "overregulation" of public schools or call into question a statutory cap on charter schools? I am skeptical that these questions generally rise to the level of being constitutional issues. I am even more skeptical that courts have the expertise or institutional competence to determine sound public policy in such areas. I am most skeptical of the notion that courts should be setting such policies, rather than the branches elected by the people to make those decisions.

I nonetheless recognize that states' statutory and constitutional provisions are different and that facts vary from case-to-case. That is why I believe courts should follow the roadmap that I set out. This roadmap serves as a natural constraint, keeping the courts within their proper role, while providing for judicial review that is robust enough for the courts to fulfill that role.

Courts should not be outcome-oriented or work backwards from a desired result. Rather, they should ask themselves whether the relevant provisions set a standard that must be met by the legislature. If so, they should determine that standard. Then they should decide whether the state has met that burden. When these steps are taken out of order—when a court picks its desired policy outcome and then works its way backwards to justify its decision—it is intruding on the policymaking role of the legislature.

V. CONCLUSION

Education is one of the most important functions of state and local governments. The overwhelming majority of legislators that I work with would agree with that assessment, and I doubt that legislators in other states are much different. Education is the foundation upon which our society is built. It leads to upward mobility. It is one of the building blocks of the American Dream.

Both state and local governments devote significant resources to educating our children, and education reforms often lead state policymakers' legislative agendas. Nonetheless, more than forty state governments have faced legal challenges to their respective school funding systems.²²⁷ Plaintiffs in these cases have generally attempted to increase funding of primary and secondary education and to decrease the inter-

227. See Chia & Seo, *supra* note 18, at 126.

district inequalities that stem from a reliance on local property taxes. Plaintiffs have met varying levels of success.²²⁸ Where they have succeeded, however, subsequent reforms have generally led to increased funding and greater funding equity among school districts.²²⁹

As discussed above, school finance litigation poses some unique questions related to the separation of powers and the proper roles of each branch of government. School finance cases have often failed to balance the principles of judicial review and judicial restraint.²³⁰ Some courts have abdicated their responsibility to provide judicial review.²³¹ Others have gone beyond their states' constitutional mandates to engage in policymaking that is properly left to state legislatures.²³² Some scholars have even surveyed the case law and found no correlation between state constitutional provisions regarding the separation of powers and state courts' decisions to reach the merits in school finance litigation.²³³

As a state legislator, I believe that courts can and should follow a more predictable method of deciding these cases. Courts should provide judicial review when the relevant provisions require it. Courts that do provide judicial review should stay within the bounds of the constitution, and their decisions should be based on the constitutional language and the facts of the case. Courts should not engage in policymaking that goes beyond the scope of their authority or expertise.

This article recommends that courts balance the responsibility of judicial review with the principle of judicial restraint. I have set out a helpful roadmap for courts to follow, not just in school finance cases, but also in other education-related litigation. Each branch of state government has a role to play. Courts should provide judicial review where appropriate; indeed, it is their duty to do so. However, a court should strive to perform its duty without intruding upon the rightful responsibilities of the legislature and the governor. I believe that the roadmap outlined above balances these concerns.

Courts should not engage in policymaking, which is beyond their constitutional role and their expertise. Nor should they shy away from

228. *See id.*

229. *See, e.g., id.* at 134.

230. *See Rethinking, supra* note 3, at 606 (“[S]chool finance cases have proven particularly troublesome in this regard.”); Thro, *supra* note 10, at 529 (stating that state courts “have mostly failed” to achieve the proper balance between judicial review and judicial restraint in school finance litigation).

231. Thro, *supra* note 10, at 530.

232. *Id.* at 532.

233. Bauries, *supra* note 9, at 701.

enforcing the peoples' rights. If they adhere to the roadmap set out above, they can be catalysts for change without overstepping their bounds.

Mitchell Hamline Law Review

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

mitchellhamline.edu/lawreview



MITCHELL | HAMLINE

School of Law

© Mitchell Hamline School of Law
875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu